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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KEITH MILES, Defendant and Appellant.	E034336 (Super.Ct.No. FVI015912) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Stephen H. Ashworth, Judge. Affirmed.

Robert Z. Corrado and Patrick A. Rossetti for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Pamela A. Ratner Sobeck, Supervising Deputy Attorney General, and Arlene Aquintey Sevidal, Deputy Attorney General, for Plaintiff and Respondent.

Savannah DeVree, a year and a half old, died as a result of "tremendous" blows to her head, side, and stomach. An autopsy revealed that her anus was also torn. The prosecution's theory was that defendant Keith Miles attempted to sodomize the baby;

when she resisted -- biting, scratching, and kicking him -- he beat her. Defendant denied attempting sodomy; he did admit hitting and throwing the baby, but he denied using enough force to cause her injuries. The defense theory was that, only minutes before defendant admittedly hit and threw the baby, a pygmy goat near which she was playing had attacked her; the anal tears were the result of either constipation or resuscitation efforts by paramedics.

A jury found defendant guilty on three counts: (1) murder (Pen. Code, § 187, subd. (a)), with the special circumstance that the murder occurred during the commission of a lewd act on a child (Pen. Code, § 190.2, subd. (a)(17)(E)); (2) a lewd act on a child (Pen. Code, § 288, subd. (a)); and (3) assault on a child resulting in death (Pen. Code, § 273ab). He was sentenced to life without parole.

Defendant contends:

1. There was insufficient evidence to support the verdicts.

2. The trial court erred by excluding evidence that the victim's three-year-old brother made out-of-court statements to the effect that a goat kicked her.

3. The trial court should have dismissed a juror who turned out to have personal knowledge of pygmy goats; alternatively, it should have granted a new trial because she discussed this knowledge with other jurors.

We find no error. Hence, we will affirm.

I

FACTUAL BACKGROUND

On October 4, 2002, defendant and his girlfriend Sayde Kehoe visited the home of Benny Jones. Jones was defendant's mother's boyfriend. Kehoe brought two of her children -- Austin, age three, and Savannah, the baby, age one and a half.

Jones kept two pygmy goats in his backyard. The male was named Sydney; the female was named Sayde.[1] The male was a "wether," i.e., he had been neutered. The goats were about as big as a medium-sized dog; they stood about knee high and weighed perhaps 40 to 70 pounds. They had been dehorned but still had "nubs" of horn.

Kehoe left to go to the grocery store. The children were playing in the backyard. Jones was inside, but he kept an eye on them, to make sure they did not fall into the pond. At one point, he noticed Austin chasing the goats. There was a firepit, ringed with stones, in the backyard. When Jones saw the children playing in it, to stop them from getting covered with ashes, he told them to come inside.

The baby came running in. She seemed normal. She was wearing overalls and a turtleneck shirt over a "onesie." She looked tired, so Jones laid her down on a couch, but defendant, saying, "I'm going to put her in the bed," took her into the spare bedroom.

Because there was no sheet on that bed, Jones got a freshly laundered one, "laid it on there and turned around and left." He talked on the phone with a girlfriend for 15 or 20 minutes. He did not see defendant or hear anything unusual. After hanging up, he

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[1] The record does not explain why one goat had the same name as defendant's girlfriend. Of course, the court reporter did not necessarily spell the goat's name correctly.

walked past the bathroom and heard defendant inside. Defendant went back into the bedroom and closed the door.

Defendant yelled, "Benny, come here." He showed Jones that the baby was sleeping with her eyes open. Together, they went back out to the living room briefly, until defendant said, "I heard something." They ran back into the bedroom. They found the baby on the carpeted floor, face down, with her knees tucked under her. She was wearing only a diaper (or possibly a diaper and a t-shirt). Defendant picked her up.

Just then, Kehoe got back. It was about 5:45 p.m. Jones went out to help bring in the groceries. According to Kehoe, defendant told her the baby had fallen off the bed. She went into the bedroom. Kehoe testified that the baby was on the floor, but sitting up and seemingly normal. She put her finger in the baby's mouth; it came out red from some juice she had been drinking.

According to Jones, however, when he returned to the bedroom, Kehoe showed him some blood on her finger and said it had come from the baby's mouth. The baby was tugging on her diaper. Jones suggested that somebody change it. Kehoe replied that she just did.

Jones testified that the adults brought the baby out to the living room. He thought she "wasn't acting right." He picked her up and "checked her out," but found nothing. Defendant took her back, then said, "[T]his kid's side is like mush . . . ." Jones touched her right side; it did feel "like mush . . . ." The baby reacted by biting him. Jones offered to call 911; defendant said no. Jones left to get cigarettes. When he got back, the baby was lying on the couch. Kehoe pointed out that her pupils were of unequal size. At some

point, Jones saw bruises on her chest. Shortly afterward, defendant and Kehoe left with the baby.

Kehoe, however, testified that she and defendant went out to the living room, leaving the baby in the bedroom. Thirty or 45 minutes later, she brought the baby out to the living room and changed her diaper. Kehoe did not see any blood or bruises. Two days earlier, Kehoe testified, the baby had been constipated. (Her sister, however, denied this.) One day earlier, the baby had had a normal bowel movement. Now, she was having diarrhea. The diaper, recovered later, contained diarrhea-like feces but no visible blood.

Perhaps two hours after Kehoe got back from the store, she noticed that the baby was less active and turning pale. She felt an "air pocket" in the baby's rib area. Jones picked up the baby to check her, but she bit him. Kehoe decided to take her to the hospital. However, she did not feel it was urgent. Accordingly, they went first to a friend's house, where they planned to spend the night, to drop off the groceries. Kehoe's mother then came to the friend's house to give them a ride to the hospital.

Kehoe realized that the baby was having trouble breathing. At 8:13 p.m., in response to a 911 call from Kehoe's mother, paramedics arrived. Defendant said the baby had fallen off a bed an hour earlier, then gotten worse. The baby was unresponsive. There were several small bruises on her chest. According to Kehoe, these had "appeared" only minutes earlier. The baby was airlifted to a hospital. By the time she arrived, her heart had stopped. Within 30 minutes, she was pronounced dead.

A doctor found two bruises on the right side of the baby's chest and stomach. Her abdomen was distended. There was a tear in her rectum, but no blood. Another external

examination, however, two and a half hours after death, revealed "blood seepage from her anal area."

Dr. Steven Trenkle, a forensic pathologist, performed an autopsy. He found three bruises on the baby's right chest and abdomen, and a fourth on her right back. On her right side, she had five fractured ribs. Her right lung was torn and collapsed. Her liver was torn in three places. Her duodenum had been "torn . . . in two." There was extensive internal bleeding. There was air in her chest, from the collapsed lung, and in her abdomen, from the duodenum. This caused the distended abdomen.

These injuries had occurred within hours before death. They would have caused rapid breathing; weakness; pallor; and, eventually, shock. The rib fractures would have been painful, especially when running. The baby would not have run voluntarily, except perhaps to escape a danger.

There were also at least three skull fractures in the back of her head. These, too, occurred within hours before death. They could all have been caused by one blow. Although there were no signs of a brain injury, she would have been stunned or even unconscious.

In addition, the baby had two anal tears. According to Dr. Trenkle, these had been caused by either "a large hard stool . . . coming out or something large and hard going in." Her frenulum was torn, and her lower lip was cut; these injuries, again, occurred within hours before death. The cut lip could have been caused by a fall. Both injuries, however, were consistent with "getting smacked in the mouth." They would have bled. Finally, x-rays revealed "a healing fracture" in the baby's left forearm that was weeks or months old.

In total, there had been at least three points of impact -- the head, the right side, and the stomach. The baby "died of the blood loss and the respiratory compromise . . . ." A fall onto a flat surface could have caused the head injuries, but not the others. A man of defendant's size could have caused them all by hitting her.

Bloodstains were found on the baby's overalls, including inside a pants leg. Those tested contained the baby's DNA; one also contained DNA from a second, male person, matching defendant. It would have matched one in 9,000 Caucasian males, one in 480 Black males, and one in 7,700 Southwestern Hispanic males.

Four bloodstains were found on the bedsheet. Two of them also showed a high level of amylase, an enzyme found in both saliva and feces. These two stains both contained DNA from the baby and from a second person. As to one stain, the second person's DNA matched defendant; again, it would have matched one in 9,000 Caucasian males, one in 480 Black males, and one in 7,700 Southwestern Hispanic males. As to the other stain, the second person's DNA conclusively matched defendant.

No semen or sperm was found on any of the baby's clothing or on any of the bed linen. Vaginal and rectal swabs taken from the baby revealed no semen or sperm and no DNA other than her own.[2] A penile swab taken from defendant showed none of the baby's DNA.

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[2] The People claim that defendant's DNA was found on the rectal swab. In light of the whole record, however, it appears that, if a witness did say this, he misspoke.

On direct, the DNA expert, Daniel Gregonis, testified:

"A. I found that the profile was from a single female that matched Samantha DeVree's profile, *both [defendant] and [Benny] Jones being the source of the DNA in that swab*.

[footnote continued on next page]

Early the next morning, defendant told police he had put the baby down in the bedroom for a nap, then left. When asked what had happened to her, he said, "I don't know. They were in the backyard playing with the goats." However, he also said "the goats were real mellow" and "wouldn't hurt anybody."

In another interview, around 9:30 a.m., the police told defendant that Jones had incriminated him and that they had found blood in the bedroom. Defendant then told them that the baby had started to scratch and bite him. " . . . I just smacked her . . . on the mouth, but, I think maybe it was too hard . . . and . . . she started . . . kicking at me and

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[footnote continued from previous page]

"Q. So when you say someone matches or their DNA profile matches your testing, what does that mean?

"A. That means through the markers that I tested it in, that all of the markers have the same genetic profile as that person's referencing.

"Q. And when you say that someone is excluded, what does that mean?

"A. That means that at one or more of the locations that they do not have the same genetic profile." (Italics added.)

On cross-examination, however, he testified:

"Q. The result of that swab was that there was only DNA found that matches Samantha DeVree; correct?

"A. That is correct."

The witness's initial answer, that the DNA matched only a "single female" and yet also matched both defendant and Jones, was self-contradictory. Significantly, the prosecutor then asked him to define not only matching, but also exclusion. In closing argument, defense counsel argued there had been no penetration because there had been no "DNA transfer." The prosecutor did not object and did not argue otherwise. When listing the evidence of penetration, the prosecutor did not mention either the rectal swab or DNA.

Thus, we believe the court reporter erred, and the witness actually testified that "both [defendant] and [Benny] Jones *were excluded as* being the source of the DNA in that swab." Nearly all of his answers concerning other items he tested were in this form. However, it is also possible that he misspoke. In any event, the cross-examination and argument clarified the record.

stuff and I just . . . threw, just tossed her down . . . ." She landed face down. He picked her up, apologized, gave her a bottle, and left.

In a third interview, at 11:15 a.m., defendant again admitted hitting the baby in the mouth and throwing her on the floor, face down. He further admitted drawing blood. He displayed a scratch on his finger and said the baby had caused it.

Although defendant had not been told about the baby's anal injuries, he volunteered that he had not been "messing around with her . . . ." When asked, "What do you mean . . . ?," he replied, "Like fucking think I'm a pervert or something." He admitted having "a bad temper." He stated, "[S]ometimes if I get mad or something . . . I don't know my own strength . . . ." He also admitted using methamphetamine the previous day at 10:00 or 11:00 a.m. Around 2:00 p.m., a sample of defendant's blood was taken. It tested positive for methamphetamine at a level consistent with the time he admitted taking it.

Dr. Andrew Lowe, a clinical pharmacist, testified that methamphetamine can cause feelings of omnipotence. It can decrease inhibitions, increase risk-taking, and increase sexual desire. Chronic use, however, may cause impotence (a condition known as "crystal dick").

Since defendant's arrest, Kehoe had talked to him at least once a day, telling him every time that she loved him. In one telephone call, she told him she had had no idea that the baby was constipated. In another telephone call, defendant instructed her, when she testified in court, to "look at me." "If I frown that means don't say nothing. If I smile, go with it." She replied, "Okay. Hopefully no one will catch it."

In another telephone call, defendant told a friend that he hit the baby in the mouth when she tried to bite him. He then said, "She kicked me in the fucking nuts and I dropped her."

Dr. Silvia Comparini, a forensic pathologist, testified about pneumatosis cystoides intestinalis (PCI), which she defined as air escaping from the intestines into the body. It can go between layers of tissue and cause them to separate. When the baby had been intubated, air had escaped from her lung and duodenum, causing bubbles that were visible in the autopsy photos. Dr. Comparini believed this had caused the anal tears. She admitted, however, that she herself had never seen an instance of PCI causing anal tears.

According to Dr. Comparini, the baby showed no signs of anal penetration, because penetration would have caused deeper tears, ruptured capillaries, and bleeding. Also, the baby's head injuries could not have been caused by hitting a flat surface, or by being hit with an object, because these would have caused a brain injury and because the fractures would have been depressed. However, they could have been caused by hitting an irregular surface, such as pebbles, twigs, or dirt in the firepit.

Dr. David Posey was a forensic pathologist who had grown up near farms where there were goats. He had heard of goats chasing and biting people. According to Dr. Posey, it had taken "tremendous" force to cause the baby's internal injuries. Her back had to have been "shored" up against something hard. Her bruises were more likely caused by a goat's head or hooves than by a hand or fist. Also, her head injuries were not consistent with being thrown to the floor. In that event, all the force would have been applied at a single point, causing a brain injury, and the scalp would have been cut or scraped. Dr. Posey was "definitely certain" that a goat had attacked the baby. It had

butted her; she landed, bouncing, on the back of her head. While she was down, it butted her again. She might still have been able to run.

Kay Cox testified as an expert on pygmy goats. According to Cox, they are "assertive" and could be "very aggressive." Males are more aggressive than females. During mating season, males will butt each other repeatedly. Cox had known pygmy goats to butt a person or animal that was annoying them. She had seen one kill a 60-pound dog by butting it. Another had butted Cox's daughter, breaking her arm.

Pygmy goats are territorial and "herd minded." A pygmy goat would try to establish dominance over a smaller animal (or a child) by butting it until it lay still, then climbing on top of it. If a child chased or annoyed a pygmy goat, it might butt or stomp on the child. It also might "take it out on" a smaller child or animal.

Bruce Schumacher also testified as an expert on pygmy goats. Schumacher agreed that pygmy goats could be aggressive. Adults will butt each other not only playfully, but also aggressively. Female pygmy goats become aggressive during the breeding season, which lasts from September through January. Schumacher had once had a female pygmy goat that butted and gored another. It would not be safe for a child to threaten a female during the breeding season.

Schumacher also testified that pygmy goats can be territorial. If the area a pygmy goat considered to be its home were "invaded," it "would take a stand." If a small child threatened a pygmy goat's territory, the goat might knock the child down or step on it. Schumacher admitted, however, he had never seen a pygmy goat seriously injure a child.

On rebuttal, Judy Starbuck, the prosecution's expert on pygmy goats, testified that they are "very loving, very gentle . . . ." "In 27 years, I have never seen a pygmy goat

show any aggression towards a human being ever." A child as young as two would be safe with a pygmy goat. During mating season, bucks will rear up and then stomp down, but not wethers. Even bucks do not ram each other. If a pygmy goat felt threatened, it would simply move away. It could run away from a three-year-old child easily.

Also on rebuttal, Dr. Trenkle defined PCI as air in the intestinal wall. The baby did not have PCI. Also, PCI does not cause anal tears. Resuscitation can force air into soft tissue, usually skin, but the skin will not tear. He had found only one reported goat attack in medical literature; a 140-pound goat had butted an 11-year-old child, causing internal injuries, but not death.

II

THE SUFFICIENCY OF THE EVIDENCE

Defendant contends the evidence was insufficient to support the verdict. His argument on this point is cursory, to say the least. He has provided us with a statement of facts barely more than a page long, which is devoid of any citations to the record. (See Cal. Rules of Court, rule 14(1)(C).) He then asserts that, "[a]s discussed above," the "evidence creates [a] reasonable doubt." (Capitalization omitted.) We deem this argument waived. "We need not consider such a perfunctory assertion unaccompanied by supporting argument. [Citation.]" (*People v. Smith* (2003) 30 Cal.4th 581, 616, fn. 8.)

In any event, there was extensive evidence that defendant killed the baby. Jones was watching the children while they were in the backyard. Savannah ran in, apparently normal. Defendant was alone with her for about half an hour. During that time, as he admitted, he hit her, drawing blood, and threw her. As the prosecutor noted in closing

argument, it would be an amazing coincidence if, only minutes before he perpetrated these heinous acts of child abuse, a goat just happened to have attacked her.

Evidently defendant does not challenge the sufficiency of the evidence of a lewd act, since he does not mention the relevant evidence at all. Out of an excess of caution, however, we note that there was also sufficient evidence that the killing occurred in the commission of a lewd act. The baby's anal tears had to have been caused either by an unusual bowel movement or by penetration. Kehoe's testimony that the baby had been constipated was thoroughly impeached. Even Kehoe admitted that the baby had had a normal bowel movement the day before and was having diarrhea on the day she died; yet blood was still seeping from the anal tears, even after death. Defendant evidently removed the baby's clothes, and he must have done something to make her start biting, scratching, and kicking him. He admitted to police, "She doesn't bite really unless she's mad, . . . she has to be real mad at you." Last, but not least, when the police interviewed defendant, he denied "messing around" with the baby like "a pervert . . . ." At that point, however, he had not been told about her anal injuries, nor had he been asked about any sexual acts.

We conclude that there was sufficient evidence to support the jury's verdicts.

III

AUSTIN'S OUT-OF-COURT STATEMENTS

Defendant contends the trial court erred by excluding, as inadmissible hearsay, Kehoe's testimony that the victim's brother Austin made out-of-court statements that a goat had kicked the victim.

A. *Additional Factual and Procedural Background*.

The trial court held an Evidence Code section 402 hearing concerning Austin's out-of-court statements. The parties stipulated, and the trial court found, that Austin was too young to be competent to testify. Kehoe then testified that, about a month after the incident, Austin told her "the goats hurt his sister." About another month after that, he told her the baby had been chasing the goats and hitting them. "[T]he big goat" kicked her with his hind legs. (Sometimes Austin said it was the little goat.) She fell on her back and cried. Austin "had to scare the goat away from [S]issy." Finally, Kehoe overheard Austin telling his older brother much the same thing.

The prosecutor objected to this evidence as hearsay. Defense counsel argued that, even if it was inadmissible hearsay under state law, the trial court had to admit it as a matter of due process because it was reliable as well as critical to the defense. (See generally *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297].)

The trial court ruled that the evidence was neither critical nor reliable: "[W]e have a three year old who is just not competent or believable because he's three years old, and to try to get in any statement he made through the testimony of the mother of the victim who is obviously biased . . . in defendant's favor is not credible. Not only can it [not?] be cross-examined, but where would you even start with it? The statement further more [*sic*] certainly doesn't help you because little Austin apparently said the little goat did it and the little goat kicked her. Well, none of that's going to wash in this case, not with her injuries. So we won't be hearing about any statements from little Austin."

B. *Analysis*.

Defendant now argues that Austin's out-of-court statements were not hearsay. At trial, however, defense counsel virtually conceded that they were hearsay; he merely argued that, "under the due process clause . . . there are certain situations where hearsay should be admissible . . . ." Accordingly, if the trial court erred by failing to recognize that the statements were nonhearsay, the error was invited.

But, of course, they were hearsay. We all remember our law school evidence professors intoning, "Hearsay is an out-of-court statement offered to prove the truth thereof." (Accord, Evid. Code, § 1200, subd. (a).) Defendant was offering Austin's statements to prove the truth of the matter asserted -- that a goat kicked the baby.

Defendant argues the statements were relevant for three nonhearsay purposes. First, he argues they were "circumstantial evidence of the injuries sustained by the victim and how they were inflicted." But that is just a roundabout way of saying they showed that a goat kicked the baby. Defendant cites *People v. Williams* (1992) 3 Cal.App.4th 1535, which held that documents in the defendant's name are admissible to show dominion and control of the premises. (*Id*. at pp. 1541-1542.) We are at a loss to see the relevance of *Williams* to this case.

Second, he argues they were relevant to show Austin's state of mind, i.e., his belief that a goat kicked the baby. Strictly speaking, this would not be a nonhearsay purpose; the evidence would still be offered for the truth of an implied assertion, that Austin believed what he was saying. However, it would make the hearsay admissible under the state-of-mind exception. (Evid. Code, § 1250.) But "[a] prerequisite to this exception to the hearsay rule is that the declarant's mental state or conduct be factually

relevant. [Citations.]" (*People v. Hernandez* (2003) 30 Cal.4th 835, 872.) Austin's *belief* was irrelevant, *except* to show that *in fact* a goat kicked the baby.

Third, he argues they were relevant as "operative facts." "[T]he operative fact doctrine [i]s as follows: '"There is a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether these things were true or false, and in these cases the words or acts are admissible not as hearsay, but as original evidence." [Citations.] In these situations, the words themselves, written or oral, are "operative facts," and an issue in the case is whether they were uttered or written. [Citation.]' [Citation.]" (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1069, quoting *Am-Cal Investment Co. v. Sharlyn Estates, Inc.* (1967) 255 Cal.App.2d 526, 541, quoting *People v. Henry* (1948) 86 Cal.App.2d 785, 789.) Once again, there was no issue in this case as to whether Austin *said* a goat kicked the baby, *unless* it showed that *in fact* a goat kicked the baby.

Defendant has abandoned his contention that, even if the statements were inadmissible under state law, they had to be admitted as a matter of due process. We merely note that, as the trial court ruled, they were insufficiently reliable to be admissible on that theory. "'[A] defendant does not have a constitutional right to the admission of unreliable hearsay statements.' [Citations.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 269, quoting *Com. v. Piper* (1997) 426 Mass. 8, 11 [686 N.E.2d 191, 194].)

We conclude that the trial court correctly excluded Austin's out-of-court statements.

IV

JUROR MISCONDUCT

Defendant contends the trial court erred by denying his motion to "excuse[]" (actually, discharge) a juror. (Capitalization omitted.) He also contends the trial court erred by denying a continuance of the sentencing hearing so he could file a motion for new trial.

A. *Defendant's Motion to Discharge Juror No. 10*.

1. *Additional Factual and Procedural Background*.

In the midst of trial, the trial court held this hearing:

"THE COURT: . . . Juror No. 10 is with us, out of the presence of the other jurors. [¶] . . . [¶] . . . Now, you indicated to the bailiff that you have knowledge of pygm[y] goats, and it was troubling you and you wanted to know --

"JUROR NO. 10: I just wanted to know some information that I didn't hear, and if I could ask about that information once we got in deliberation, and so -- but --

"THE COURT: Based on the knowledge you have of pygm[y] goats?

"JUROR NO. 10: Of what I've had of my own.

"THE COURT: You wouldn't be able to do that?

"JUROR NO. 10: Oh, that's what I wanted to know because I knew I couldn't just speak.

"THE COURT: Have you, by chance, talked to any other jurors about your knowledge of pygm[y] goats?

"JUROR NO. 10: No. No. No other than what I stated here when the attorneys questioned me about if I, you know, had, and I said, 'Yes, we had pygm[y] goats when my kids were little.'

"THE COURT: Okay. Would you be able to put the knowledge you have of pygm[y] goats out of your mind for the purposes of continuing to be a juror?

"JUROR NO. 10: Well, sure. This is -- I wanted to know what it was that I was allowed to do.

"THE COURT: Oh, okay.

"JUROR NO. 10: If I was allowed to -- because I know their interactions and stuff, and I just wondered because a neutered pygm[y] --

"THE COURT: We don't need to know what you know, but -- what's important is, and I would think it would be kind of hard to do, really, having knowledge like you do; would you be able to put it out of your mind and base your verdict in the case, your decisions in the case, strictly on the evidence that you hear in the case?

"JUROR NO. 10: Well, if I'm instructed to do that. I did it before, you know, with the other jury that I was on. I know I could follow the instruction, but I just was curious about, you know, what I was allowed to do.

"THE COURT: Right. Right. Do you think you have a grasp of it now?

"JUROR NO. 10: Yes. If I'm not -- not allowed to let that -- that knowledge that I have enter into what I can do about a decision, then I will exclude that, even though it's something I know about.

"THE COURT: Right. [¶] [Defense counsel], do you have any questions of the juror?

"[DEFENSE COUNSEL]: Yes. [¶] . . . [¶] . . . Will you still be able to listen to the testimony and judge the testimony, independent of your prior knowledge, or do you think that if you hear something that's inconsistent about what you have in your mind that you're going to discredit or discount that testimony and not give it the appropriate weight? In other words, because of your knowledge of pygm[y] goats, you might think that they're vicious, the kindest thing in the world, if your testimony -- are you going to filter the testimony through what your feeling is through the animal?

"JUROR NO. 10: Well, if I'm instructed to do that, that's -- I didn't propose this question because I wanted to know what it is that I was allowed to do, and if I knew something that hasn't been presented here, and I wondered if that was allowed or if it was not, and so that's why I spoke.

"When you guys questioned me and decided whether I was going to be on this thing or not, I told you I do it to the best of my ability and that's what I'm doing.

"[DEFENSE COUNSEL]: My question though is: You're going to hear a lot of testimony, I'm sure, about this?

"JUROR NO. 10: Uh-huh. Uh-huh.

"[DEFENSE COUNSEL]: We have asked this question before. For example, if you were very fond of peace officers, and all of the testimony that comes out that's positive for peace officers, you would agree because you're fond of them, but when testimony comes out that's negative, well, it's, 'No, I'm fond of them, therefore, I'm going to be resistant.' If that['s] true or not, I don't want to hear that, and I'm asking if you have a feeling towards pygm[y] goats one way or another?

"JUROR NO. 10: Uh-huh. Well, it's just a fact that I knew about -- well, either defense or prosecution -- if -- well, if I'm allowed to use any part of that, then that's what I'll do.

"[DEFENSE COUNSEL]: Well, there might be testimony coming out, though, that deals with -- I gathered what you're saying, and I know where you're going --

"JUROR NO. 10: And if you don't feel that I will be, then you better excuse me. [¶] . . . [¶]

"THE COURT: I would just think if I were in her shoes, I would find it difficult.

"JUROR NO. 10: Okay. Then maybe I should excuse myself.

"THE COURT: But I don't think that you're indicating to us that you'll find it difficult.

"JUROR NO. 10: Well, no. It was just something that bothered me because I've heard other things about -- medical things that I would have liked to ask questions, but it's not presented, so I just let it go?

"THE COURT: Yeah. . . . [¶] You're not asking to be excused?

"JUROR NO. 10: Oh, no. Only if you don't think that I'll be able to do my job."

Defense counsel moved to have Juror No. 10 discharged. He noted that there would be testimony that the male goat had been neutered, and neutered goats were are not aggressive. He argued that Juror No. 10 would have a "bias." He also expressed a concern that she might share her knowledge with other jurors during deliberations. The trial court ruled: "[T]here's no basis for the [c]ourt to excuse her because she's indicated that she wouldn't have a problem . . . ."

2. *Analysis*.

Penal Code section 1089, as relevant here, provides: "If at any time, whether before or after the final submission of the case to the jury, a juror . . . upon . . . good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged . . . ." (See also Code Civ. Proc., §§ 233, 234.)

Defendant relies on Code of Civil Procedure section 225. That section deals with challenges to a prospective juror, not a motion to discharge a seated juror. We recognize, however, that "[a] sitting juror's actual bias that would have supported a challenge for cause [under Code of Civil Procedure section 225] also renders the juror unable to perform his or her duties and thus subject to discharge [under Penal Code section 1089]. [Citation.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 581.)

"[W]e review a trial court's determination to discharge a juror by applying an abuse of discretion standard and will uphold that decision if there is substantial evidence supporting it. We also require a juror's inability to perform as a juror to appear in the record as a '"'demonstrable reality.'"' [Citations.]" (*People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. omitted.)

Preliminarily, we believe defendant waived his present contention. Both parties had asked in voir dire about jurors' experiences with goats. Juror No. 10 had disclosed the fact that she had owned pygmy goats. There is no indication that defendant challenged her, either for cause or peremptorily. A challenge to an individual juror must be made before the jury is sworn; otherwise, it is waived. (Code Civ. Proc., § 226, subd. (a); *People v. King* (1970) 1 Cal.3d 791, 804.) This waiver rule would be meaningless if a party could nevertheless move to discharge the juror on the same grounds under Penal

Code section 1089 after he or she is seated. (See *People v. Stonecifer* (1856) 6 Cal. 405, 411 ["a party who accepts a juror, knowing him to be disqualified, is estopped from afterwards availing himself of such disqualification"].)

Here, the trial court's colloquy with Juror No. 10 did not develop any new grounds for challenging her beyond what she had already disclosed in voir dire. The mere fact that she specifically mentioned neutered goats did not add anything. A person who had kept pygmy goats necessarily would have some impression about whether they were aggressive or not, and if so, under what circumstances. We conclude that defendant waived the juror's knowledge of pygmy goats as grounds for discharge.

Even if not waived, defendant's contention lacks merit. It was Juror No. 10 who sought out the bailiff -- not because she felt she would have any difficulty being impartial, but because she wanted a question asked. When the trial court examined her, she emphasized that she had not discussed her experience with her fellow jurors. She testified that she could follow the trial court's instructions and decide the case based strictly on the evidence. She noted that she had contacted the bailiff precisely because she wanted guidance on what she was and was not allowed to do. This amply supported the trial court's finding that she was still able to perform properly as a juror.

B. *Motion for New Trial*.

1. *Additional Factual and Procedural Background*.

On June 4, 2003, the jury returned its verdict. The trial court set a sentencing hearing for July 7. On June 11, however, defense counsel moved to continue the sentencing hearing to August 18. He noted that he intended to file a motion for disclosure of the jurors' personal identifying information as well as a motion for new

trial. The trial court continued the sentencing hearing to August 18, but it indicated that any motion for disclosure or for new trial would have to be filed in time for sentencing to proceed on that date -- "Whatever date that's set, that's when it's going to happen. That's what I'm telling you."

Nevertheless, on August 13, defense counsel filed a written motion for a continuance of the sentencing hearing, on the ground that he intended to file a motion for new trial based on juror misconduct. On August 18, the date set for sentencing, defense counsel claimed two jurors had told him that Juror No. 10 "did discuss her experiences with the jurors and shared that with the jurors." He wanted disclosure of other jurors' personal identifying information. He concluded: "[I]f the court would like, I can put my investigator on, and he can testify as to his discussion with the two jurors. He is present for that purpose, and we can proceed with that, but I'm . . . requesting a continuance so that I can further perfect a motion for new trial."

The trial court ruled: "The request for continuance is denied. You have not made a legally sufficient showing to warrant the case be continued for the purpose that you've indicated, and as you know, you can't go into the deliberations of the jurors, and their mind sets [*sic*] when they were deliberating and especially[] on this particular issue where the defense is that a pygm[y] goat committed the injuries that the victim suffered. The defense was so tenuous, and we had three or four experts testify on that specific issue, so I don't see that your request warrants the continuance.

"Also, at the time of conviction, I indicated that . . . whenever [the case] was set [for sentencing], it's going to go.

"DEFENSE COUNSEL: I also ask[ed] for a later date. [¶] . . . [¶]

"THE COURT: Two months, hasn't it been? That's more than sufficient time, so the [c]ourt finds that is not sufficient[] to justify the defendant not being sentenced today . . . .

"DEFENSE COUNSEL: . . . I also have other grounds for motion for new trial.

"THE COURT: [Y]ou should have filed it. . . .

"DEFENSE COUNSEL: The [c]ourt's denying my oral motion for new trial?

"THE COURT: Correct."

2. *Analysis*.

Defendant asserts that the trial court "erred in disallowing [him] to file a motion for new trial." (Capitalization omitted.) We understand him to mean that it erred by denying the requested continuance.

"Continuances shall be granted only upon a showing of good cause . . . ." (Pen. Code, § 1050, subd. (e).) "A trial court exercises broad discretion in determining whether good cause exists to grant a continuance under section 1050." (*People v. Henderson* (2004) 115 Cal.App.4th 922, 933, fn. omitted [Fourth Dist., Div. Two].) "A showing of good cause requires a demonstration that counsel and the defendant have prepared . . . with due diligence. [Citations.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

Here, the trial court could reasonably find that defense counsel had not been diligent. More than two months earlier, he had declared his intent to file a motion for disclosure and a motion for new trial. The trial court had warned him that the sentencing hearing would go forward on August 18. Nevertheless, he had not filed either motion. Nor did he make any showing of diligence. He did state, "[M]y investigator had a very

difficult time tracking down the jurors on his own . . . ." That would not have been necessary, however, if he had filed a timely motion for disclosure. He also claimed some jurors had refused to talk to his investigator, but there was no reason to think a continuance would change that. Thus, the trial court did not err by denying a continuance.

The trial court also stated that it was denying defendant's oral motion for a new trial. Presumably it was referring to defense counsel's offer to call his investigator to testify. The investigator's testimony as to what the jurors told him, however, would have been inadmissible hearsay. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1256.) "Normally, hearsay is not sufficient to trigger the court's duty to make further inquiries into a claim of juror misconduct." (*Ibid*.) Thus, the trial court likewise did not err by denying the motion for new trial.

V

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

GAUT
J.